SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 173

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IDA PHILLIPS,

*Petitioner,*

—v.—

MARTIN MARIETTA CORPORATION,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## BRIEF FOR RESPONDENT

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May, 1970

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 1058

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IDA PHILLIPS,

*Petitioner,*

—v.—

MARTIN MARIETTA CORPORATION,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## BRIEF FOR RESPONDENT

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## JURISDICTION

The judgment of the Court of Appeals was dated and entered May 26, 1969, and a certified copy thereof was issued as a mandate to the District Court on June 17, 1969, as required by Rule 41(a), Federal Rules of Appellate Procedure, no petition for rehearing having been then or thereafter filed. (A. 39a) On July 29, 1969, the Chief Deputy Clerk of the Court of Appeals sent a letter to counsel advising them that "Pending further order of the Court, the mandate heretofore issued is being recalled." The letter did not purport to amend or vacate the judgment previously entered. It also recited that "at the request of one of the members of the Court in active service" the parties were requested to file and exchange further briefs on the case. (A. 40a-41a)

On October 13, 1969, the Court of Appeals entered an order, *per curiam,* unanimously subscribed to by the original panel, to the effect that "The petition for rehearing is denied." (A. 42a) No petition for rehearing had in fact been filed. The order also recited that at the request of one of the members of the court, the circuit judges in regular active service had been polled and a majority were not in favor of a rehearing *en banc,* and that, accordingly, rehearing *en banc* was also denied. This aspect of the order was entered by a 10-to-3 vote, the three dissenters being judges who were not members of the original panel. (A. 42a) The petition for certiorari was filed on January 10, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT

This action was commenced by petitioner, Mrs. Ida Phillips, against respondent by a complaint filed in the District Court for the Middle District of Florida under Title VII of the Civil Rights Act of 1964. The complaint charged respondent with "maintaining a policy, practice, custom or usage of discriminating against the plaintiff, and other female persons with pre-school age children similarly situated, because of sex. . . ." (A. 3a) The complaint charged that petitioner had submitted an application for employment as an assembly-trainee to respondent pursuant to an ad in the local newspaper which advertised positions for 100 assembly-trainees, but was told by a receptionist, when she gave her application in at the respondent's office, that respondent "was not considering applications from women with pre-school age children." (A. 3a-4a) The complaint recited certain administrative proceedings which had taken place before the Equal Em-

ployment Opportunity Commission ("EEOC"), and prayed for an injunction against interference with the rights of petitioner and "others similarly situated to enjoy equal employment, treatment, advancement or training for advancement as secured by Title VII. . . ."; for retroactive employment with back pay for petitioner; and for costs and attorney's fees. (A. 5a-6a)

Annexed to the complaint was a decision of the EEOC[1] dated July 14, 1967, (A. 8a-10a) which indicated that the original charge by petitioner made before the EEOC was as follows:

> "When she applied for a job with Respondent in response to a newspaper advertisement, the receptionist told her that her application could not be considered because Respondent was not hiring *people* with pre-school age children." (Emphasis supplied.)

The EEOC decision at another place stated that when petitioner "gave her application to the receptionist, she was told that Respondent was not considering applications from people with pre-school age children." The decision also recited that in the investigation before the EEOC, respondent stated that it did not have any formal rule "on applicants with pre-school age children" but that it "prefers not to hire women who have young children." (A. 9a)

The respondent filed a motion to dismiss the complaint and to strike certain of its allegations. (A. 13a) By order dated February 27, 1968, the court ordered that those

[1] Such a decision of the EEOC has no evidentiary effect in the subsequent court proceedings, under the statute (§706(a)), but the filing of charges with the EEOC is a prerequisite to an individual's right of action under the statute. §706(e). See §706, Pub. L. 88-352, 78 Stat. 259 (1964), 42 U.S.C. §2000e.

portions of the complaint "concerning the alleged denial of a right based upon the claim that the plaintiff was discriminated against because she has pre-school age children" should be stricken.[2] However, the court held that the allegations of violation of the Act based on discrimination because of sex would not be stricken. (A. 14a) Thereafter, respondent filed an answer which denied any discrimination on the basis of sex on the part of respondent, or that petitioner was refused employment solely on the basis of her sex. The answer did admit that plaintiff unsuccessfully applied for employment with respondent on the date she specified in her complaint, and that the receptionist told her that applications from women with preschool-age children were not being considered. (A. 16a-17a)

No further proceedings directly pertinent to the present issues were taken in the action until respondent filed a motion for summary judgment on May 31, 1968. The motion was supported by an affidavit of the head of the respondent's employment department at the location in question to the effect that respondent's policies required compliance with Title VII of the Act; that no discrimination with respect to sex in hiring was practiced; that between 70 to 75% of the applicants for assembly-trainees at the time in question were women; and that approximately 75 to 80% of all those actually hired as assembly-trainees at the time were women. (A. 18a-19a) These

[2] That order also ordered the portions of the complaint alleging the action to be a class-action to be stricken. (A. 14a) No appellate review has been sought in this Court with respect to this aspect of the court's order. The notice of appeal to the Court of Appeals included this issue (A. 29a), but the Statement of Issues filed as part of petitioner's brief in that court omitted it and the opinion of the Court of Appeals mentioned the fact that the allegation had been stricken (A. 31a) but made no further reference to it.

statistics were not disputed, and the record stands that the overwhelming proportion of applicants for the positions in question were women and that an even higher proportion of those hired were women.

While it is undisputed that respondent has no written policy, either at the corporate level or at the level of the plant in question, discouraging or even relating to the hiring of persons with preschool-age children, it is also undisputed on this record that the receptionist who took Mrs. Phillips' application said words to the effect that respondent was not considering applications from women with preschool-age children. The record does not contain any indication of precisely what it was that this low-level employee of respondent said to petitioner. The record is also completely silent as to whether whatever it was that the employee said would have been understood by people to whom the remark was addressed as excluding from consideration for employment women with preschool-age children who had a responsible adult living in their home during the day, such as a grandparent, unemployed spouse, unmarried or widowed sister, or the like.[3] The record is silent as to what would have been said to Mrs. Phillips if she had said she was in this category.

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[3] There is nothing in the record which even purports to be a direct quote from the receptionist. Even if we had a direct quote, presumably we could not interpret it in the same fashion as one would interpret a business contract or other commercial instrument. In popular speech, "women with preschool children" might mean what petitioner takes it to mean, namely, any woman who is the mother of children who are currently alive and at the preschool age. Or it might mean women who in the ordinary course of the day were left alone in their homes "with" preschool children, that is, mothers who had no relative living in their home with whom they could leave the children. Quite possibly because Mrs. Phillips was in the latter category, she did not pursue the matter further.

The record is, of course, also completely silent as to whether, if there were some exception under these circumstances, Mrs. Phillips would be in a position to have taken advantage of it. The record's only information as to Mrs. Phillips' domestic arrangements are that she has seven children, the youngest of which at the time of the action was a preschool-age child, all of whom have a different last name from hers;[4] perhaps the inference that conceivably could be drawn from this last fact is that she is the sole custodian of her children, although we do not suggest that such an inference can be drawn from this meager record. There is also no evidence of record as to what would have been respondent's attitude toward hiring a father with custody of preschool-age children, who was divorced, a widower, or the like, and living alone, and hence dependent upon outside baby-sitting arrangements, where there were other applicants, male or female, in sufficient numbers for the assembly-trainee positions, who did not have this domestic complication.[5]

In short, the record tells us nothing at all about Mrs. Phillips and her arrangements for the care of her seven children except the fact that she has seven children; nothing about the dimensions of respondent's attitude toward hiring people with custody of preschool-age children, outside of the statement made by the receptionist; and what it tells us about the respondent's hiring practices

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[4] This is found in her affidavit supporting her motion for leave to appeal *in forma pauperis* (A. 26a-27a) and was not before the District Court when it granted judgment.

[5] It is commonly supposed that there are substantially fewer men than women in this category. Although the record is perfectly silent on this point, this may have been the reason why (apart from the obvious fact that Mrs. Phillips was a woman and any statement as to men would, accordingly, have been irrelevant) the receptionist said that *women* with preschool-age children were not being considered for employment.

with respect to sex and assembly-trainees is that the overwhelming percentage of people hired are women—indeed, in a higher proportion than the proportion of women in the people applying.

Almost a month after the service of the respondent's motion for summary judgment, the petitioner served a request for the following admission upon respondent: "That the Martin Marietta Corporation now employs males with pre-school age children in the position of Assembly Trainees." (A. 21a) The District Court granted the motion for summary judgment before the time for responding to the request had run, and the request was, accordingly, never answered. However, we can advise this Court that, if answered, the answer would have been "yes," and that the answer would indeed have been "yes" had the word "females" appeared in the request in lieu of the word "males."

The District Court on July 9, 1968, granted the motion for summary judgment, observing that the respondent had, during the relevant period of time, hired 479 women for the job category for which the petitioner had applied; that 75 to 80% of the employees of the respondent holding the position were women; and that this percentage was higher than the percentage of women who applied. The court never found just what respondent's practices were with respect to the hiring of women (or men, for that matter) with custody of preschool-age children.* In

* The District Court assumed that the answer to the request for admission would have been affirmative. (A. 22a-23a) The court, however, found that this fact was irrelevant to the issue before it (A. 23a) as indeed it was when viewed in light of the time which would have any relevance for comparative purposes (September 6, 1966, contrasted with the time to which the request was directed —June 26, 1968). (A. 21a) The assumption that males with pre-school-age children were employed by respondent appears to have

its brief opinion, the court observed that: "The responsibilities of men and women with small children are not the same, and employers are entitled to recognize these different responsibilities in establishing hiring policies." The court also held that the plaintiff had submitted no affidavits tending to show that she was discriminated against because she was a woman. Finding no genuine dispute of material fact, the court granted the motion for summary judgment. (A. 22a-23a) Because of this ruling, the court did not consider or reach the other defenses raised in respondent's answer, or those, such as the so-called "bona fide occupational qualification" defense, which it might have raised under the general issue at trial.

On petitioner's appeal, the Court of Appeals for the Fifth Circuit on May 26, 1969, affirmed, in an opinion by Circuit Judge Morgan in which Judge McGowan of the District of Columbia Circuit, sitting by designation, and Circuit Judge Gewin concurred. The court's opinion treated the case as presenting the general proposition of a differentiation "between men with pre-school age children, on the one hand, and women with pre-school age children, on the other." (A. 36a-37a) It then dealt with this general proposition in a rather general way. The court observed that it was possible to conclude that this sort of distinction constituted a prohibited discrimination, justifiable only under the "bona fide employment qualification" provision of the statute. However, it noted that the EEOC, which appeared *amicus* before the Court of Appeals, "has

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been thereafter treated by the petitioner and the Court of Appeals as tantamount to a finding that respondent would discriminate between men and women similarly situated with respect to custodial arrangements for their preschool-age children, which, of course, it is not. However, as will be developed later, the state of the record on this summary judgment motion does not affirmatively establish that respondent treated alike males and females having in fact similar custodial responsibilities.

rejected this possible reading of the statute." (A. 37a) The court stated that this left it "only with the alternative of a Congressional intent to exclude absolutely any consideration of the differences between the normal relationships of working fathers and working mothers to their preschool age children." The court observed that: "If this is the only permissible view of Congressional intention available to us, as distinct from concluding that the seeming discrimination here involved was not founded upon 'sex' as Congress intended that term to be understood, we have no hesitation in choosing the latter." (A. 37a)

The court's opinion also contained a further general observation to the effect that "Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired." (A. 36a)

The Court of Appeals, on its own motion on July 29, 1969, recalled the mandate which had been on June 17, 1969 issued under its judgment entered May 26, 1969. A letter from the Chief Deputy Clerk of the court (A. 40a-41a) recited the request of one of the members of the court in active service that there be further briefing "with particular reference to the standard to be applied under the statute forbidding discrimination because of sex." (A. 40a)

On October 13, 1969, the court entered an order denying rehearing[1] and reciting that rehearing *en banc* was also

[1] The court's order recites that a *petition* for rehearing was denied. The brief for the United States as *amicus curiae* in this matter (Gov't Br. 1-2) also erroneously recites that a "timely petition for rehearing" was filed and denied. The brief for petitioner makes no such assertion, though it does unexplainedly refer to a "timely request for rehearing" by a member of the court. (Pet. Br. 2) No petition for rehearing was ever filed, as indeed footnote 1 to Chief Judge Brown's opinion in the Court of Appeals, dissenting from the court's denial of rehearing *en banc*, makes plain. (A. 43a)

denied, the latter by a 10-to-3 vote of the judges in active service. Chief Judge Brown filed a dissent, in which two other judges concurred, from this action. The dissent particularly focused on, and took issue with, the general expressions by the original panel to the effect that the "coalescence of . . . two elements", one a factor prohibited by the statute and the other a nonprohibited factor, was sufficient to justify the respondent's denial of employment to the petitioner.

This Court granted certiorari on a petition which framed the sole question presented as "Whether the sex discrimination prohibition of § 703, Civil Rights Act of 1964, is violated by refusal to hire all women with preschool children while hiring men of the same class, where the distinction does not purport to be based on a bona fide occupational qualification."

## SUMMARY OF ARGUMENT

A. The petition for certiorari was not filed within the time provided by law and accordingly the writ of certiorari should be dismissed. The petition was not filed within 90 days of the judgment entered on May 26, 1969, but rather, more than seven months thereafter. No petition for rehearing or motion to amend the judgment was filed, and neither the Court of Appeals' order of October 13, 1969, nor the letter from the Chief Deputy Clerk which preceded it, operated to toll the time for petitioning for certiorari or to establish a fresh date from which to petition for certiorari.

B. 1. The sole question on the merits before this Court is the question whether the District Court erred in granting respondent's motion for summary judgment on the

record as it then stood. That record, although perhaps abbreviated in content, presented no material issue of fact on petitioner's claim of discrimination. Petitioner's general allegation of such discrimination had been rebutted by respondent's affidavit to which no counteraffidavit was filed. Petitioner's allegation that a receptionist told her that respondent was not considering applications for women with preschool-age children standing alone, and even taken as true, does not state a claim under the Civil Rights Act, unless it is coupled with a comparison of respondent's treatment of males with preschool-age children at the relevant time. Petitioner's election not to adduce any proofs concerning respondent's treatment of such males at the relevant time resulted in a situation where there was presented no issue of material fact for resolution by the District Court to preclude summary judgment for respondent.

2. The briefs of petitioner and the various *amici* range broadly over the practice, apparently not uncommon in industry, of considering as a negative factor in employing job applicants, the fact that they are directly responsible for the supervision of preschool children. These briefs discuss a range of practices or possible practices which are not presented by the truncated record in this case. Many of the abstract positions taken appear to be without justification in terms of the statute.

3. The generality of the assertions by the petitioner and *amici* as to what is and is not permissible in this area are the consequence of the state of the record in this case. The record is silent as to what would have been respondent's attitude had Mrs. Phillips volunteered that she had other custodial arrangements for her preschool-age

children, or conversely, what attitude the respondent would have taken toward a male applicant who was also subject to a custodial problem similar to that of a woman applicant.

4. This case comes before the Court as a result of the grant of respondent's motion for summary judgment, the granting of which motion precluded the development of a more adequate record. The interpretation of this minimal record by petitioner and the *amici*—and apparently by the Court of Appeals—leads us to the conclusion that the summary disposition of the case upon our motion—although defensible—may have contributed to the possible distortion of the principles governing discrimination by reason of sex. If that is so, we recognize that the importance of avoiding erroneous interpretations of the significant principles of the Act might prompt this Court to conclude that it must reverse the judgment of the Court of Appeals, set aside the grant of summary judgment by the District Court, and remand the case for further proceedings, so that the record might reflect with appropriate particularity the employment practices of respondent in all relevant respects, on which a determination could be made as to whether they violated the Act.

## ARGUMENT

### A. *As to the Timeliness of the Petition for Certiorari*

The petition for certiorari in this matter was not filed within the time provided by law. Since the period for petitioning for certiorari from a civil judgment of the Court of Appeals is governed by statute, 28 U.S.C. §2101(c), the failure to petition within the time prescribed is jurisdictional and the writ of certiorari should be dismissed for want of jurisdiction.[1] See *Teague* v. *Commissioner of Customs*, 394 U.S. 977 (1969); *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942); Stern and Gressman, *Supreme Court Practice* (4th ed. 1969), p. 242.

The petition for certiorari in this case was filed on January 10, 1970, over seven months after the entry of judgment on May 26, 1969, and would be clearly untimely unless the Court of Appeals' order of October 13, 1969, set the 90-day period for petitioning for certiorari running once again. We submit that it did not. No petition for rehearing was filed, either within the 14 days contemplated by Rule 40(a), Federal Rules of Appellate Procedure, or otherwise. Accordingly, the established doctrine that the filing of a timely petition for rehearing tolls the time for petitioning for certiorari until the order disposing of the petition is entered (see *Department of Banking* v. *Pink*, *supra*, 317 U.S., at 266) is not applicable. Nor was there any other motion filed by any of the parties, such as a motion to amend the judgment, of a nature which would have a similar effect upon the original judgment. See

[1] Accordingly, although respondent did not raise this point in opposing certiorari, it may be raised and considered by this Court at this time.

*United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944); *United States* v. *Adams*, 383 U.S. 39, 41 (1966).

The only action that was taken here was an action taken by the court itself. That action is expressed solely in the Chief Deputy Clerk's letter of July 29, 1969, and in the court's order of October 13, 1969. The Chief Deputy Clerk's letter advised that the court had recalled its mandate to the District Court. But it is hornbook law that it is the date of entry of the judgment, not the date of transmittal of the mandate or any judgment entered on it, that is determinative of the time for petitioning for certiorari. See *Boylan* v. *United States*, 257 U.S. 614 (1921); Stern and Gressman, *supra*, at 246. Indeed, this is underscored by Rule 41(b), Federal Rules of Appellate Procedure, which provides for a stay of the court of appeals' mandate pending application for certiorari. If the stay of the court's mandate prevented its judgment from being final, such a stay would also operate to extend the time for petitioning for certiorari, which is manifestly not so.

The only other effect of the Chief Deputy Clerk's letter was to advise that at the request of one of the members of the court in active service, the parties were requested to brief the case further. Neither the letter nor any order of the Court of Appeals ever purported to vacate the judgment or to announce that the court proposed to amend or modify its judgment. The letter was not the equivalent of an order by the court that the case be reheard. Thus, the case does not fall within the exception established by the doctrine of *Zimmern* v. *United States*, 298 U.S. 167 (1936), which holds that the time for review runs afresh when a court, on its own motion, actually opens up its judgment. Here, the judgment was never vacated, amended, or otherwise opened up; no petition for rehearing was ever filed;

and the only order ever entered by the Court of Appeals after the entry of its judgment was one refusing rehearing on that judgment.[2]

Indeed, it appears that the only rehearing requested was simply pursuant to an internal request made by a member of the court who was not on the panel which sat to decide the case. The Federal Rules of Appellate Procedure, promulgated by this Court, expressly provide that even the pendency of a suggestion for rehearing *en banc* made by a party "shall not affect the finality of the judgment of the court of appeals. . . ." Rule 35(c). If a suggestion made by a party, through the filing of a formal document entered in the court of appeals' docket, does not affect the finality of the judgment entered, and hence extend the time for petitioning for certiorari, so much the less would an informal request made internally in the court of appeals by a member of the court who was not on the panel.[3] This is, of course, particularly the case where the internal "suggestion" for rehearing *en banc* was denied and the judgment never opened up or revised.

The case presented, then, is one which is within the doctrine of *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 209-12 (1952). That case teaches where there has been no petition for rehearing or motion to amend filed by a party, it is only where the court "changes matters of substance, or resolves a genuine ambiguity, in a judgment

[2] To be sure, the judgment may at the relevant times have been within the power of the court, *sua sponte*, to revise it; but the existence of that power does not detract from finality. *Market Street R. Co.* v. *Railroad Comm'n*, 324 U.S. 548, 550-52 (1945); Stern and Gressman, *supra*, at 248-50.

[3] It appears relevant, too, that even that internal "suggestion" was made well after the time had expired for petitioning for rehearing or suggesting rehearing *en banc*. Rules 35(c), 40(a), Federal Rules of Appellate Procedure.

previously rendered" that the time to petition for certiorari runs afresh. 344 U.S., at 211. In cases where there is no petition for rehearing or motion to amend the judgment, but simply an order of the court of appeals subsequent to the entry of its judgment, this Court in the *Honeywell* case held that: "The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." 344 U.S., at 212. Here, it is clear that the October 13, 1969, order did not disturb or revise the prior judgment; it denied any further hearing with respect to it. That judgment was never the subject of a timely petition for rehearing or motion to amend, and it was never vacated by the Court of Appeals. Nor was there ever even a motion for leave to file an untimely petition for rehearing. See *Bowman* v. *Loperena,* 311 U.S. 262, 266 (1940).

The time for petitioning for certiorari, then, ran from the May 26, 1969, judgment. The petition for certiorari was thus out of time, and the writ of certiorari should be dismissed. A contrary conclusion would disturb the finality of judgments and open up the possibility of extension of the time for petitioning for certiorari in this Court by action of a minority of a court of appeals, which did not even participate in the panel deciding the case, in cases where the parties have not sought rehearing or amendment of the judgment and where the whole court, including the panel which decided the case, does not vacate or amend its judgment. Such a conclusion would be not only unfortunate from the standpoint of judicial administration and the prompt disposition of cases, but would appear to raise a conflict with the statutory provisions that permit only Justices of this Court to extend the time for petitioning for certiorari.

### B. *As to the Merits*

1. Underlying all the material in all the briefs for petitioner and the several *amici* supporting her is the question whether the District Court erred when it granted respondent's motion for summary judgment. (A. 22a-23a) It is therefore essential to review the framework of the record in which the District Court's summary judgment order was entered.

In her complaint (A. 2a-6a) the petitioner undertook to charge the respondent with a violation of her rights under Title VII of the Act. She asserted that "When she gave her application to the receptionist, she was told that defendant was not considering applications from women with pre-school age children." Petitioner then made the general, conclusionary charge that: "Defendant refused to employ plaintiff solely on account of her sex." (A. 4a) Petitioner attached to her complaint a copy of the decision of the EEOC (A. 8a-10a) which makes the statements quoted at page 3 of this brief.

In response to the complaint, respondent filed several motions, among them a motion to dismiss for failure to state a claim upon which relief could be granted. (A. 13a) While it did not grant the motion to dismiss as such, the District Court did strike certain portions of the complaint. (A. 14a-15a) The District Court expressly struck the allegations based on a refusal to hire petitioner because she had preschool-age children. In so doing the District Court asserted (A. 14a):

> ". . . it being the holding of this Court that discrimination based upon an applicant [a word encompassing both males and females] having pre-school age children is not a discrimination based upon sex in viola-

> tion of the Civil Rights Act. However, the allegation alleging a violation of the Civil Rights Act based solely on discrimination because of sex remains unstricken. . . ."

It is apparent from the foregoing that the District Court understood that the refusal to hire *an applicant* because of preschool-age children did not violate the Act. It is, of course, not seriously disputed that, if such an employment standard is not applied discriminatorily, this is a proper interpretation of the statute. It therefore seems apparent that the order of the District Court did not strike or eliminate from the petitioner's complaint her charge that she, individually, was discriminated against because she was a woman with preschool-age children.

The motion for summary judgment was heard on July 8, 1968. (A. 22a) Prior thereto, on June 26, 1968, petitioner served a single request for admission: "That the Martin Marietta Corporation *now* employs males with preschool age children in the position of Assembly Trainees?" (emphasis supplied). (A. 21a) At the time of the hearing, the time for responding to the request for admission had not expired.

It was this record, therefore, that the District Court had before it at the hearing on the motion for summary judgment. It is only in retrospect that the order entered at that hearing can be viewed in the light of statistics and assertions not found in the record which have subsequently been raised in the briefs.

When the District Court was called upon to rule, it was presented with a record which contained two issues. One was the issue raised by the general allegation that petitioner had been discriminated against because of her sex.

The other was the issue arising out of the charge that petitioner had been discriminated against on September 6, 1966, because she was a woman with preschool-age children.

There was no evidence in the record of any act of discrimination by the respondent, the closest thing to it being petitioner's allegation that the receptionist had told her the respondent was not considering applications from women with preschool-age children. To rebut any inference that there might be some policy of discouraging female employment, respondent submitted an affidavit reflecting its apparent preference for women at the time in question for the position aspired to by petitioner. (A. 19a-20a) The petitioner elected not to present any counter-affidavits—if indeed she could have—that respondent had acted in a discriminatory fashion.

It would appear, therefore, that the case reduced itself on summary judgment to whether there was any issue of material fact raised in the record by the allegation of what petitioner was told by respondent's receptionist. That allegation (A. 4a) standing by itself, and even taken as true for the purposes of the motion, does not state a claim within the meaning of Section 703(a). Standing alone, the fact that an employer declines to offer employment to women with preschool-age children does not constitute a violation of the Act, and to be such, must necessarily be coupled with a comparison of the treatment of males with preschoolage children at the relevant time. In this connection, it will be recalled that this is a refusal-to-hire case, and the relevant time would be the time at which the applicant applied for employment—in this case, September 6, 1966. (A. 3a) A request that respondent admit, on June 26, 1968, that respondent "now" employs

males with preschool-age children in the position of assembly-trainee (A. 21a), even if answered in the affirmative, would have no relevance to the petitioner's case.

It is submitted, therefore, that on this view of the record, the District Court was correct in granting the motion for summary judgment.

2. From the material submitted in the briefs for the petitioner and the various *amici*—which, understandably in the light of the skimpy nature of the record in this case, rely almost exclusively on extra-record materials in this respect—it appears that there is a fairly widespread practice in industry—particularly, assembly types of manufacturing industry where employee absence poses particular problems—of considering as a negative factor in employing job applicants the fact that they are directly responsible for the supervision of small children too young to attend school.

Presumably people having custody of small children would not apply for work at all unless they had the prospect of making some arrangements either with their spouse or other relative in the home, or with a baby-sitter in or outside the home, or with a day-care center, to take care of their children. But it appears that certain employers think that at least certain sorts of these arrangements have a way of breaking down (or that they cannot provide custody where the child becomes sick or is too ill to leave the house or to be mixed in with other children); that this is particularly so where employees must work different shifts in different weeks; and that accordingly certain sorts of these custodial arrangements expose a person having custody of small children to a substantial risk of absenteeism or other work interruption. Presumably this belief leads to the practice of considering

custody of small children as a negative factor in hiring. This practice, we may assume, takes different shapes and forms, and some of these forms may well pose problems under the provisions of the Civil Rights Act of 1964 which prohibits discrimination in employment by reason of sex. The briefs of petitioner and of the *amici* range rather broadly and generally over the question of the way in which recognition of the factor of custody of a preschool-age child may be considered, consistent with that Act.

Thus, the brief for petitioner at one point (Pet. Br. 9) appears to assert that even a discrimination against all married people, of either sex, on the one hand, as opposed to single people, on the other, or against all people with children, on the one hand, in favor of people without children on the other, is justifiable under the Act only where business interests are shown to require the same. This view we suppose to be erroneous inasmuch as the Act does not purport to protect a particular marital or parental status against unequal treatment in employment at all. In another place (Pet. Br. 12), the petitioner appears to make a contention to the effect that an employment rule which discriminated against any parent who was sole parental custodian of a preschool child, whether that custodian is a man or woman, would be violative of the Act because it would tend *in practice* to restrict "employment opportunities for those groups of women who most need jobs because of economic necessity," presumably, because as a practical matter it would mainly affect them. Whatever the economics of the matter, that such a rule would be impermissible under the statute is far from evident.

At a further point in her brief, petitioner makes the suggestion that the "primary adverse impact [of any rule tending to restrict employment of parental custodians of

preschool-age children] is on blacks." (Pet. Br. 13) Further economic material outside of the record is introduced in the brief at this point in support of this proposition. We should observe that there is no evidence whatsoever, nor was there any charge in the complaint, that respondent engages in racial discrimination. Indeed, petitioner carefully refrains from suggesting that she is black herself and the record shows she is not (Tr. of Hearing on Defendant's Motion to Strike, p. 25; unprinted record p. 200).[1]

Again, the briefs of the *amici* address themselves to practices and issues not presented by the record. Thus, the brief of "Human Rights for Women, Inc." (H.R. Br. 9-10) essays an elaborate model of what sort of rule or practice in this area might be consistent with the Act. It suggests that there would have to be a rule which was not only neutral on its face, that is, applicable to all single (including divorced and widowed) parents of preschool-age children regardless of sex, but also neutral in its operation. A rule, according to this *amicus,* would not be neutral in its operation if more women than men were affected by it, *i.e.,* if more women than men were sole parental custodians of preschool-age children. Of course, since everyone knows that this is so, there could not be any employer consideration whatsoever of custody of preschool-age children under the Act, and the fact that, as here, a very high percentage of the women applying were employed for the categories

[1] Perhaps in an effort to introduce the same extraneous factor into this case, the brief for the United States makes an argument based on the following premise: "An employer's refusal to hire otherwise qualified Negroes with pre-school age children, while hiring whites with such children, is obviously proscribed." (Gov't Br. 13) We do not understand the relevancy of this assertion to this case at all. If it is an attempt to assert that no differences may be recognized between the sexes that are not recognized between the races under the Act, we would suggest that it contravenes the legislative history of the Act as well as common experience.

in question would not be relevant to refute the inference of discrimination. We see no basis for the conclusion that the abstract position suggested by this *amicus* is correct.

In a similar category may be placed the apparent suggestion by the United States that an employer should not be permitted to draw a distinction, neutral as to sex, between parents with custody of preschool-age children who have other responsible adults resident in the house, on the one hand, and those who have to rely upon day-care centers, on the other. (Gov't Br. 5) Once again, there is nothing in the Act about discrimination in hiring as between parents who have other adults resident in their households to take care of preschool-age children and those who must make other arrangements, and accordingly, it is hard to square this position with the text of the Act.

3. The generality of the assertions by the petitioner and *amici* of what is or is not permissible in the area of the extent to which an employer may recognize the factor of custody of preschool-age children, as well as the rather general and abstract discussion in the opinion of the Court of Appeals, is, we regret to say, apparently the consequence of the present state of the record. For that state, respondent's motion for summary judgment was, we admit, primarily responsible. That state is simply that a receptionist told petitioner that "women with pre-school age children" were not being considered for employment. The affidavit in support of respondent's motion for summary judgment, the answers of respondent to petitioner's interrogatories and this conclusionary sentence are the only evidence in the record of what respondent's policy is.[2] To

[2] There is no direct evidence dealing specifically with respondent's policy as to hiring men with custodial problems caused by preschool-age children.

be sure, as a practical matter, whatever may be the technical state of the record, the receptionist's remark cannot and should not be considered as equivalent to a written, formal, inflexible company policy that no woman with a living preschool-age child would be employed as an assembly-trainee. We do not have direct evidence in the record to show with specificity what the response of the receptionist—or of a more responsible level in the company, if the matter had been pursued—would have been if Mrs. Phillips had said one of the following things:

a. "While I have a preschool-age child, I am divorced and custody of that child was awarded to my husband."

b. "While I have a preschool-age child, my husband is disabled and spends his time at home but is capable of taking care of the child during my shift and does so."

c. "While I have custody of a preschool-age child, my husband is unemployed at home and takes care of the child during my shift."

d. "While I have custody of a preschool-age child, and while I am divorced (or while my husband works during my shift), my widowed mother lives with me (us) and takes care of the child."

In any of these cases, for all we know, the receptionist might have answered "That is different"; or that conclusion might have been reached after she checked the matter out. Of course, we also do not know on the present record whether Mrs. Phillips was in a position to make any of those statements.

Again, the petitioner, the *amici* and the Court of Appeals have treated the present state of the record as technically standing that, simply, men with preschool-age children were not disqualified from being employed as assembly-trainees. However, we question whether as a practical matter any court should assume that if it became evident during the employment interview that a male employee—for example, a widower—had sole custody of small children living alone with him, so that he would be missing from the assembly line if his outside baby-sitting arrangements broke down, such an applicant would be blithely hired by respondent while it was disqualifying women under similar circumstances. It would take an affirmative prejudice, in the classic sense, against women for an employer to do that. The very high percentage of women actually hired for the job in question—which indeed appears to be a sort of small-part assembly job that women are commonly supposed to excel at—indicates that as a practical matter no such prejudice exists, and that a discrimination in favor of the male applicant in the case put would not have been practiced.

4. The fact of the matter is, however, that the present record affords no real basis, by way of evidence bearing directly on those points, for determining what in fact would have been the respondent's reaction under any of the cases we have put. And the record has been left without direct evidence as to whether respondent would ever consider a father's custodial problems with respect to preschool-age children as a negative factor in hiring. To be sure, these deficiencies in the record are in substantial part due to the grant of the motion which respondent itself made for summary judgment—although petitioner herself developed no details about these matters, or, indeed, about

her own status, presumably preferring to have the state of the record left on a *per se* basis.

As this case comes before this Court on review of the grant of summary judgment, it is made to appear by the petitioner and the *amici*—particularly in light of some of the language of the Court of Appeals in its opinion—that, as a technical matter, respondent had an inflexible policy:

A. that women with preschool-age children would not be employed *at all*, notwithstanding the circumstances—that is, even if the woman did not have custody of the children, or if she did, even if there was a responsible adult, including her husband, resident in the household and at home during the day to take care of the children; and

B. that no man with a preschool-age child, however great the custodial problems that child imposed on him (as, for example, in the widower case above), would be disqualified or adversely rated in hiring on that account.

We must agree that such a practice would constitute a discrimination based on sex which would be prohibited by the Act.[3] The present record, because of the summary nature of the proceedings in the District Court, appears to have invited the conclusion that it presents that rather technical issue. But because of the somewhat abstract nature of the record as developed, including the absence

[3] Unless justified under the "bona fide occupational qualification" provision. Because of the grant of summary judgment on the issue whether there was discrimination presented, respondent has never been required to put forth its proof on "bona fide occupational qualification," but if a discrimination is shown on remand, it should have the right to do so if it so elects. (See pp. 28-29, *infra*.)

of any specific information as to what exceptions would be made to the attitude expressed by the receptionist, as to under what circumstances a disqualification of fathers with custody would have been imposed, and as to the relevance of Mrs. Phillips' own domestic condition to whatever exact shape the respondent's policy would appear to have upon a full examination, it affords no real basis for examining any other question as to the permissibility of the consideration of the factor of custody of young children in employment under the Act.

To be sure, respondent defended the judgment before the Court of Appeals and prevailed there. But the highly general theory of the Court of Appeals, which may have been induced by the meager facts of record, may not be capable of defense in a number of the instances postulated by the petitioner and the *amici*. Our further review of the record in this matter leads us to the conclusion that the disposition of the case by summary proceedings in the District Court, at our instance and upon our motion —although defensible—may have created a basis for confusion—and perhaps even distortion—of the important principles of the provisions of the Civil Rights Act of 1964, which prohibits discrimination in employment by reason of sex. Indeed, as illustrated by the briefs of the petitioner and her *amici*, some portions of the opinion of the Court of Appeals may be subject to the construction that the law permits women and men exactly similarly situated with respect to problems arising out of the custody of small children to be treated differently, which we concede the law does not permit.

Accordingly, if this Court should conclude that grant of summary judgment, on our motion, by the District Court on the meager record before it, has given rise to

improper inferences as to the meaning and construction of the provisions of the Act prohibiting discrimination in employment on the basis of sex, this Court might then conclude that to avoid confusion and misconstruction of the important principles involved in the Act, the judgment of the Court of Appeals should be reversed and the case remanded to the District Court to vacate its judgment and order entered July 9, 1968, and for further proceedings to cause the record to reflect precisely and with appropriate particularity what the hiring practices and policies of respondent were in all relevant respects, and whether they violated the Act. We would assume that it would be open on such a remand for respondent to undertake to show—if appropriate under the circumstances—that its acts complained of were based upon a reasonable business necessity. We would assume that it would also be open for respondent to show, if it can, that if its actual practice did amount to a discrimination on account of sex, that discrimination—that is, any precise way in which its policy as to parents having custody of small children differed as between mothers, on the one hand, and fathers, on the other—was based upon a bona fide occupational qualification, that is, a reason justifiable in business terms for the specific difference in treatment,[4] and that it would not be prejudiced in this respect by the

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[4] Pertinent to any such defense would be reference and statistical material such as the Public Health Service's analysis of data that women with children are more likely to have a higher frequency of absences:

> "This observation supports the contention that women's commitment to the family constellation results in higher frequencies of absence. Mothers are, at least theoretically, more often faced with role conflict than are women without children.

fact that it does not assert that there is any bona fide occupational qualification to exclude women as such from the position in question.[5]

## CONCLUSION

For the reasons stated, the petition for certiorari was not filed within the time provided by law and the writ of certiorari should be dismissed. Should the Court disagree with this conclusion and reach the merits, respondent recognizes the importance of the principles of law raised by petitioner, the various *amici* and the Court of Appeals relating to the proper scope of Title VII, and recognizes that it is important that they not be confused or misinterpreted. However, respondent submits that this case presents a narrow issue on a limited record which neither requires nor provides an appropriate background for the decision of the issues tendered by petitioner and the *amici*. For the reasons stated, therefore, we respectfully submit that the grant of summary judgment by the District Court,

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Thus the roles of worker and mother come into conflict, and the result is the dominance of the mother role with the worker role supported by recourse to absence behavior." Backenheimer, *Demographic and Job Characteristics as Variables in Absences for Illness*, appearing in 83 Public Health Reports (Public Health Service, Department of Health, Education and Welfare) 1029, 1031 (1968).

A similar increase in absenteeism among women with small children has been reported in other countries. See, *e.g.*, Isambert-Jamati, *Absenteeism Among Women Workers in Industry*, LXXXV International Labour Review 248, 252 (1962).

[5] As, indeed, it could not and does not, since approximately 80% of the employees in the category are women.

on the record before it, was correct and that the judgment of the Court of Appeals which upheld it should be affirmed.

Respectfully submitted,

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